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IN THE

Supreme Court of the United States.

No. 314. October Term, 1931.

REALTY ACCEPTANCE CORPORATION,
Petitioner,

v.

HENRY G. MONTGOMERY.

BRIEF FOR PETITIONER.

I. OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Third Circuit, to be reviewed in this proceeding, is reported in 51 Fed. (2d) 642 (R., 54).

II. JURISDICTION.

This case comes before this Court on a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, granted October 19, 1931 (R., 223), under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, now appearing as Section 347 (a) of Title 28 United States Code Annotated.

III. STATEMENT OF THE CASE.

Henry G. Montgomery (hereinafter referred to as "plaintiff") brought an action at law against petitioner, Realty Acceptance Corporation (hereinafter referred to as "defendant"), in the District Court of the United States

for the District of Delaware, to recover damages arising from defendant's alleged breach of its contract to employ plaintiff for a term of years as its President. Under a written stipulation the case was tried to the Court without the intervention of a jury. The question as to the enforceability of the contract and all other legal defenses were determined by the trial court adversely to the defendant, and in favor of the plaintiff. The trial court recognized and applied the well-settled principle that plaintiff's damages were prima facie the contract salary for the balance of the contract term of employment, less plaintiff's earnings during such remaining term. Plaintiff testified as to his occupation and earnings during such remaining period. His testimony was the sole testimony as to such earnings and was not at the trial controverted by defendant. On May 1, 1929, the trial court rendered its verdict in favor of the plaintiff and assessed plaintiff's damages at the sum of $80,500 (R., 196). On May 11, 1929, judgment was entered in that amount. (R., 61.) On June 6, 1929, being at the same term of court at which the verdict was rendered and judgment entered, defendant perfected its appeal to the United States Circuit Court of Appeals for the Third Circuit (R., 208).

On January 15, 1930, the Court of Appeals handed down its *per curiam* opinion finding that the judgment below should be affirmed (R., 212) [51 Fed. (2d) 636-641]. The defendant filed its petition for rehearing which operated to stay the mandate. While this petition for rehearing was pending, defendant filed in the Court of Appeals its petition supported by affidavits. Such petition and affidavits set out newly discovered evidence showing that the uncontroverted testimony of the plaintiff at the trial in the District Court as to the amount earned by the plaintiff during the balance of the contract period of employment was in a most material manner incorrect and untrue, and that as a result of such incorrect and untrue testimony he had obtained judgment for a shockingly unwarranted and unjust amount. The peti-

tioner requested leave of the Court of Appeals to ask the District Court to request the Court of Appeals to remand the cause and the record therein to the District Court, to the end that it might vacate its judgment and reopen the cause for the purpose of taking and considering the newly discovered evidence bearing solely on the quantum of the judgment (R., 3). On March 26, 1930, the Court of Appeals entered an order granting the leave sought by petitioner, and further ordered that all proceedings in the cause then pending in that court be stayed until after the District Court should have heard and decided defendant's petition and if allowed, until it should have finally acted upon the matters raised thereby (R., 11).

Pursuant to the leave granted by the Court of Appeals defendant filed its petition, supported by affidavits, in the District Court. After a full hearing the District Court on June 23, 1930, entered an order that the Court of Appeals be requested to dismiss the pending appeal without prejudice, and to remand the cause and the record to the District Court to the end that that court might vacate the judgment entered therein and on defendant's application reopen the cause for the purpose of taking and considering the certain newly discovered evidence bearing solely on the quantum of the judgment (R., 44). The last mentioned order having been certified to the Court of Appeals, that Court on June 28, 1930, entered an order dismissing defendant's appeal from the said judgment "without prejudice" and remanding the cause and the record therein to the District Court "to the end that the said District Court may vacate the judgment entered herein and on application of defendant-appellant reopen the said cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment" (R., 45). The order of the Court of Appeals having been certified to the District Court, that court, on June 30, 1930, entered an order setting aside the judgment and reopening the cause "for the purpose of

taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment" (R., 48).

On September 11, 1930, plaintiff appealed to the United States Circuit Court of Appeals for the Third Circuit from the last mentioned order of the District Court. Before this appeal was heard plaintiff also filed a motion in the Court of Appeals asking that court to vacate its order of June 28, 1930. Plaintiff's appeal and motion were grounded on the contention that the Court of Appeals, notwithstanding the cause was then pending (undetermined) in that court on an appeal seasonably taken from the District Court, had no authority to authorize the District Court to open the judgment in the trial court and take and consider newly discovered evidence, because at the time of making such order the term of the District Court at which such judgment was entered had expired.

On July 6, 1931, the Court of Appeals handed down an opinion (R., 54), and pursuant to such opinion entered two judgments, one directing that the order of the District Court of June 30, 1930, vacating the judgment entered therein should be reversed (R., 59); and the second directing that the order of the Court of Appeals of June 28, 1930, dismissing without prejudice the first appeal taken by defendant and remanding the cause to the District Court to the end that that court might open the judgment and hear newly discovered evidence solely on the quantum of plaintiff's damages, be vacated (R., 212). In thus vacating its own order the Court of Appeals appears to have based its action on the fact alone that the date of such order was after the expiration of the term of the District Court at which such judgment had been entered. This despite the fact that the District Court in setting aside the judgment was not exercising any power qua District Court but only acting under express authority to it from the Court of Appeals which then had sole control of the cause; and de-

spite the fact that Section 701, Revised Statutes (Title 28, U. S. C. A., sec. 876), was called to the court's attention.

It is not disputed that petitioner complied with the requirement of due diligence on its part with respect to the newly discovered evidence and that such evidence was material on the issue of plaintiff's damages. Each of these questions was affirmatively decided by both the Court of Appeals and by the District Court.

Specification of Errors.

The petitioner insists that the Circuit Court of Appeals erred—

1. In holding that because of the expiration of the term of the District Court at which the judgment was entered it was without power to authorize the District Court to vacate the judgment and reopen the cause to hear and consider certain newly discovered evidence bearing solely on the quantum of plaintiff's damages although an appeal had been seasonably taken and was then pending in the Appellate Court.

2. In holding that its order of June 28, 1930, dismissing defendant's appeal without prejudice and remanding the cause to the District Court to the end that that Court might vacate the judgment and reopen the cause for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the judgment, should be vacated.

SUMMARY OF THE ARGUMENT.

I.

The case being in the Circuit Court of Appeals on appeal seasonably taken, that Court had power to remand the case and the record therein to the District Court with authority to the District Court to vacate the judgment appealed from and reopen the cause to take and consider

certain newly discovered evidence, and this without reference to the expiration of the term of the District Court at which such judgment was entered.

II.

The decision of the Court of Appeals so restricts the powers given it under section 701 of the Revised Statutes (Title 28, U. S. C. A., sec. 876), as to largely destroy the power of a United States Circuit Court of Appeals to correct manifest wrongs.

III.

The Circuit Court of Appeals had power to authorize a new trial on one separable issue only of the case, and the issue of "the quantum of plaintiff's damages" in this case was clearly a separable issue.

ARGUMENT.

Point I.

The case being in the Circuit Court of Appeals on appeal seasonably taken, that Court had power to remand the case and the record therein to the District Court with authority to the District Court to vacate the judgment appealed from and reopen the cause to take and consider certain newly discovered evidence, and this without reference to the expiration of the term of the District Court at which such judgment was entered.

Verdict was rendered May 1, 1929. Judgment on the verdict was entered May 11, 1929, as of May 1, 1929 (R., 61). Defendant's appeal was allowed and bill of exceptions signed June 6, 1929 (R., 208). Appeal was perfected June 7, 1929. The terms of the United States District Court for the District of Delaware are fixed by statute. They are four, held on the second Tuesdays of March, June, September and December (Act of March 3, 1911, c. 281, sec. 75; 28 U. S. C. A., sec. 148). The court will take judicial notice that the March Term, 1929, of the District Court for the District of Delaware, commenced March 12, 1929, and expired by limitation June 10, 1929. It thus appears that in this case verdict was rendered, judgment entered, and appeal perfected, all at the same term and there can be no question but that the case was properly pending in the Circuit Court of Appeals.

It is settled that after an appeal to a United States Circuit Court of Appeals has been taken and perfected, all jurisdiction over the case is transferred from the District Court to the Court of Appeals. Keyser v. Farr, 105 U. S. 265, 26 Law Ed. 1025. In the present case the Court of Appeals having acquired exclusive jurisdiction over and control of the appealed case, that Court had full power to authorize the District Court in the manner shown by its order of June 28, 1930, and the action of the District Court pursuant to the authority contained in that order was legally justified and proper.

In Angle v. United States, 162 Fed. 264, a situation somewhat similar to the one which confronted the Court in entering the order now challenged was presented to the Judges of the Fourth Circuit. In that case the Court of Appeals was petitioned to modify its judgment of affirmance so that it would appear that

> "while the judgment of the court below is affirmed, it is remanded with leave to the court below to exercise its discretion in the matter of granting a new trial, on the ground of evidence discovered *after the expiration of the term at which the judgment of conviction was entered,* and after the cause had been removed to the Circuit Court of Appeals by writ of error. Under the procedure as now established, in the absence of permission given by this court, it will be the duty of the court below, after it has received the mandate of this court affirming the judgment complained of, to see that the same is carried into execution."

Continuing, the Court said:

> "It therefore becomes our duty by an examination of the affidavits in which the after discovered evidence is set forth to determine whether or not the petitioner has presented for our consideration such facts as will authorize us to suggest to the court below the propriety, in the light of the record of this cause, of hearing and of disposing of the motion for a new trial so far as the petitioner Angle is concerned." . . .
>
> "*While it is entirely proper for an appellate Court, in a case where the facts justify it, to remand a case with leave to the court below to hear a motion for a new trial,* or *to entertain further proceedings therein,* nevertheless, in the case we now consider, we find it to be our duty to decline to modify the judgment complained of and to deny petitioner's prayer."

In Martin v. United States, 17 Fed. (2d) 973, after the expiration of the trial term, application was made to the Court of Appeals for the Fifth Circuit (in which an appeal was then pending) to authorize the Trial Court to entertain a motion for a new trial. At page 976 the Court held,—

> "The District Court had lost jurisdiction to entertain a motion for a new trial at the time the so-called confession of perjury was made, and may now exercise its discretion to grant or refuse a new trial *only by the consent of this Court. We have no doubt that upon a proper showing it would be our duty to authorize the District Court to exercise that discretion.*"

Further in Scott v. United States, 165 Fed. 172, and in Davis v. United States, 47 Fed. (2d) 1071, and in Perry v. United States, 39 Fed. (2d) 52, the Court of Appeals for the Fifth Circuit held to the same effect. In Perry v. United States, the Court in passing on such a motion long after the expiration of the judgment term of the Trial Court, at page 54, held,—

> "There is no doubt that in a proper case a motion to remand to the District Court with permission to consider newly discovered evidence or to show perjury on the part of a material witness may be granted in the discretion of the appellate court in order to do justice."

In Larrison v. United States, 24 Fed. (2d) 82, the Circuit Court of Appeals for the Seventh Circuit entertained no doubt whatever of its power, in a case before it on appeal, to remit the record to the Trial Court with authority to grant a new trial.

In the recent case of Gasoline Products Company v. Champlin Refining Company, 283 U. S. 494, 75 Law Ed. 1188, the Circuit Court of Appeals for the First Circuit had reversed a judgment of the District Court of the United States for the District of Maine *but set aside the verdict only as to damages,* and had remanded the case to the District Court for a new trial on the question only of the damages of defendant below under its counterclaim. This court while affirming the power of a Circuit Court of Appeals to award a new trial on one separable issue only, nevertheless reversed the Court of Appeals for the First Circuit

on the ground only that in that case the issue of defendant's damages under its counterclaim was not an issue separable from the other issues in that case. It is respectfully submitted that the decision of this Court in Gasoline Products Company v. Champlin Refining Company, *supra*, fully and completely sustains the position of the petitioner in this proceeding and the decisions of the Circuit Courts of Appeal for the Fourth and Fifth and Seventh Circuits in the cases cited. In the Gasoline Products Co. case, and in the cases in the Fourth and Fifth and Seventh Circuits, as in this, the judgment term of the District Court had expired. In that case as in these an appeal had been seasonably taken and the case was exclusively within the control of the Court of Appeals. The order of June 28, 1930 of the Court of Appeals in this case was in substance the same as the order of the Court of Appeals of the First Circuit in that case. In that case judgment was vacated by the Court of Appeals; in this case the Court of Appeals authorized the District Court to vacate the judgment. In that case the verdict was set aside only as to defendant's damages under its counterclaim and in all other respects affirmed; in this case the judgment as to plaintiff's damages only was set aside and the verdict for the plaintiff in all other respects left unaffected. What was there done was what was here done, except as to form only. This Court recognized as proper the proceedings in that case save as to the separable quality of the issue upon which the new trial was authorized.

Point II.

The decision of the Court of Appeals so restricts the powers given it under section 701 of the Revised Statutes (Title 28 U. S. C. A. Sec. 876) as to largely destroy the power of a United States Circuit Court of Appeals to correct manifest wrongs.

The Court of Appeals in entering its order of June 28, 1930 was acting well within the power conferred upon it by the above statute. Section 701 R. S. reads:*

> "The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, *or* may direct such judgment, decree, or order to be rendered, *or* such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon."

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*NOTE: In Section 876 of Title 28 of United States Code which is intended to be a restatement of Section 701 R. S., an obvious error was made in omitting the words "circuit court, or district court acting as a circuit court," so that Section 876 of Title 28 seems to be limited to "a district court in prize causes." Notwithstanding this incorrect restatement in the Code, Section 701 R. S. is in effect for all purposes, because Section 2 (a) of the United States Code provides:

> "The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. *In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.*" (Italics ours.)

This section, though passed by Congress before the passage of the Act creating the Circuit Courts of Appeal, has been declared by the Supreme Court to be applicable to Circuit Courts of Appeal as well as to the Supreme Court. In Ballew v. United States, 160 U. S. 187, Chief Justice White after referring to Section 11 of the Act of March 3, 1891 (Act creating the United States Circuit Courts of Appeal), at page 201 of the report used the following language:

> "With reference to the newly established courts, in section 11 of the act it was provided as follows:
>
> > 'And all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error.'
>
> "It thus conclusively appears that the authority of this court to reverse, and remand with directions to render such proper judgment as the case might require, upon writs of error in criminal cases, to state courts and to the Circuit Courts in capital cases, was confessedly conferred by express statutory provisions, *and that a like power was conferred upon the Circuit Courts of Appeals and Circuit Courts in cases where they exercised jurisdiction by error in criminal cases over the District Court.*"
>
> "From this and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, *it follows as a necessary conclusion that general authority was given to it on writ of error to take such action as the ends of justice, not only in civil but in criminal cases, might require.*"

It will be noticed that the objective of Chief Justice White was to show that a power which concededly by the statute was exercisable by both the Supreme Court and the

Circuit Courts of Appeals *in civil causes* was exercisable also in criminal cases. It is earnestly submitted that Ballew v. United States shows conclusively that under Section 701 R. S., *supra,* a Circuit Court of Appeals as well as the Supreme Court "may direct such judgment . . . to be rendered, or such further proceedings to be had by the inferior court, *as the justice of the case may require.*"

From the foregoing it clearly appears that the Circuit Court of Appeals for the Third Circuit, in the present case, in holding that the expiration of the trial term at which the judgment appealed from was entered left it without authority to make its order of June 28, 1930, was in direct conflict with the decision of this Court in the Gasoline Products Company case and with the cited decisions of the Circuit Courts of Appeal for the Fourth and Fifth and Seventh Circuits, and in disregard of the express statutory provisions of Section 701 R. S.

The Court of Appeals states in its opinion that it is controlled by the decision of this court in United States v. Mayer, 235 U. S. 55. That decision, however, simply held that a District Court had no power to set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during the term. It is respectfully submitted that that case is clearly distinguishable from the instant case. There the application was made to the District Court *after* the expiration of the term at which the judgment was entered, and such application was heard on the merits by the District Court by consent of the parties. No authority to the District Court from an Appellate Court was present, and it was not acting pursuant to a mandate or authority of any Appellate Court which then controlled the case. At that time the District Court unquestionably had lost jurisdiction of the case. Here an appeal had been seasonably taken by the defendant and at the time of the entry of its order of June 28, 1930, the case was exclusively in the Appellate Court and under its jurisdiction. The District

Court in opening the judgment was exercising not any power of its own but only the authority given to it for the purpose by the Court of Appeals which then had sole control of the cause.

The Court of Appeals in its opinion also states that it was "without power to confer original jurisdiction upon or restore lost jurisdiction to the District Court with respect to a new trial after the term." Here again, it is respectfully submitted, the Court of Appeals overlooks the fact that by the appeal seasonably taken, jurisdiction of the cause was transferred to the Court of Appeals, and that Section 701 R. S. expressly conferred upon the Court of Appeals authority in cases "lawfully brought before it for review" to do exactly what it did do, that is, direct "such further proceedings to be had by the inferior court *as the justice of the case may require.*"

We submit that this Court's decision in Gasoline Products Company v. Champlin Refining Company is conclusive as to the power of a Circuit Court of Appeals in a case pending therein on appeal to authorize the Trial Court to hear evidence concerning, and correct the result of mistake or fraud in the judgment below. But without such decision we feel confident that the plain meaning of the language of Section 701 Revised Statutes, as well as the end for which courts exist, namely to do substantial justice between parties, would prevent such a forced construction of such language as would withdraw from a Federal Appellate Court the power to act as in this case.

Point III.

The Circuit Court of Appeals had power to authorize a new trial on one separable issue only of the case, and the issue of "the quantum of plaintiff's damages" in this case was a separable issue.

In Gasoline Products Co. v. Champlin Refining Co., *supra,* this Court upheld the power of a Court of Appeals to

direct a new trial on one separable issue only. This Court said:

> "Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again."

This Court reversed, however, because the issue of "defendant's damages under its counterclaim" was "so interwoven with that of liability that the former could not be submitted to the jury independently of the latter without confusion and uncertainty"; as stated by this Court the dates of the contracts there alleged to have been breached and the date of the breach had not been found by the jury and such dates were necessary to any determination of such damages.

In this present case the issue of the "quantum of the judgment" to which the new trial was limited, was not related to, connected with or dependent upon any other issue of law or of fact in the case. The action here was for damages for the alleged breach of an employment contract whose term was a specified period from a specified date at a specified annual salary. (R., 64.)

In the pleadings the defendant admitted the execution of the contract and of course its date; likewise its repudiation (claimed to be legally justified) of such contract, and the date of such repudiation. (R., 82-89.)

The trial court in its "findings and verdict" said: "As the contract was valid and as it has been broken by the defendant, the plaintiff is entitled to a judgment for his damages. The measure of damages for the breach is the contract price unpaid, less the sums, if any, shown in mitigation of damages." (R., 203, 7th line.) All defenses legally justifying its alleged breach of contract were rejected by the District Court whose decision as to such was affirmed by the Court of Appeals. The salary for the balance of the contract term was, of course, a fixed amount,

and hence the only issue to be determined was the amount in mitigation to be deducted therefrom, namely, the amount of plaintiff's earnings during the remainder of the contract term. Under the order of the Court of Appeals of June 28, 1930, the District Court was authorized to determine anew the amount of plaintiff's damages because the after-discovered evidence showed that the plaintiff's earnings after the breach were very much greater in amount than testified to by him at the trial. This is shown by the Court of Appeals in its opinion, where it states: "On the issue of damages the plaintiff proved his loss without testifying, in mitigation of damages, to money he had earned after his discharge, which, if earned, he was, of course, bound to state." (R., 55, 7th line.) Again, the Court of Appeals in referring to the newly discovered evidence stated in its opinion: "This evidence as presented by the defendant's verified petition and *not controverted* by the plaintiff tended to prove that the plaintiff has since his discharge earned a substantial sum of money concerning which at the trial he did not testify in mitigation of damages, and that the discovery was made under circumstances which, as to the defendant's diligence, brought it within the rule of after-discovered evidence." (R., 55, 25th line.)

The Court of Appeals below in its opinion stated (R., 57, at bottom) it made a mistake in authorizing the District Court to have a new trial on this one issue without first requiring defendant to show that the matter was of a kind triable on a single issue. We do not know what the Court of Appeals intended by this statement. It refrains from stating that such issue was not a separable one. It is submitted that such a statement was relatively impossible. The hearing on defendant's petition for leave in the Court of Appeals proceeded on the unquestioned basis that every issue of law and fact in the case was foreclosed against the defendant except the single issue of the amount of plaintiff's earnings after his discharge. The after-discovered evidence related exclusively to the amount of such earnings. The

order of the Court of Appeals of June 28, 1930 expressly confined the new trial to the "quantum of the said judgment," which in this case necessarily limited the new trial issue to the amount of plaintiff's earnings after his discharge. The issue of the "quantum of the said judgment" in this case was clearly a separable issue within this Court's decision in Gasoline Products Co. v. Champlin Refining Co.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the order or judgment of the Circuit Court of Appeals for the Third Circuit, entered July 6, 1931, reversing the order of the District Court entered June 30, 1930, setting aside the judgment and reopening the case for the purpose of taking and considering certain newly discovered evidence bearing solely on the quantum of the said judgment, should be reversed and the order of the District Court affirmed; and also that the order or judgment of the Circuit Court of Appeals, entered July 6, 1931, vacating its own order of June 28, 1930 which remanded the cause to the District Court with authority to vacate the judgment and reopen the cause, should be reversed.

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